

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LISA BELYEW,

Plaintiff,

v.

M. PALLARES, et al.,

Defendants.

Case No. 1:20-cv-00623-JLT (PC)

**FINDINGS AND RECOMMENDATIONS
TO DENY PLAINTIFF'S MOTION TO
PROCEED *IN FORMA PAUPERIS* AND
DISMISS ACTION WITHOUT PREJUDICE**

(Doc. 2)

14-DAY DEADLINE

Clerk of the Court to Assign a District Judge

Before the Court is Plaintiff's application to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. (Doc. 2.) Because Plaintiff has more than three "strikes" under section 1915(g) and fails to show that she is in imminent danger of serious physical injury, the Court recommends that her application be denied.

I. THREE-STRIKES PROVISION OF 28 U.S.C. § 1915

28 U.S.C. § 1915 governs *in forma pauperis* proceedings. The statute provides, "[i]n no event shall a prisoner bring a civil action ... under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

II. DISCUSSION

Plaintiff has filed numerous lawsuits in this judicial district.¹ The Court notes the following six cases that have been dismissed for failure to state a claim on which relief can be granted:² (1) *Belyew v. Lamalfa, et al.*, No. 2:17-cv-01095-KJN (E.D. Cal. Oct. 10, 2017); (2) *Belyew v. Honea, et al.*, No. 2:17-cv-01189-GEB-CKD (E.D. Cal. Jan. 10, 2018); (3) *Belyew v. Butte County Jail Medical Staff*, No. 2:17-cv-00506-JAM-EFB (E.D. Cal. June 25, 2018); (4) *Belyew v. Dupre-Tokos*, No. 2:18-cv-00052-WBS-EFB (E.D. Cal. Aug. 31, 2018); (5) *Belyew v. Taylor, et al.*, No. 2:18-cv-00907-JAM-CKD (E.D. Cal. June 19, 2019); and, (6) *Belyew v. Jones, et al.*, No. 2:18-cv-00895-MCE-EFB (E.D. Cal. Aug. 20, 2019). All of these cases were dismissed before Plaintiff initiated the current action on May 1, 2020. Plaintiff is therefore precluded from proceeding *in forma pauperis* in this action unless, at the time she filed her complaint, she was under imminent danger of serious physical injury. *See Andrews v. Cervantes*, 493 F.3d 1047, 1052-53 (9th Cir. 2007).

In her complaint, Plaintiff alleges that she suffers from sleep deprivation due to inmates being placed above her bunk on “1 up” instead of “4 up.” (Doc. 1 at 2-3.) Plaintiff states that she suffers from post-traumatic stress disorder, and “that anytime the inmate on the top bunk moves, [she] suffers ‘flashbacks’” and immediately wakes up, causing her to lose sleep. (*Id.*) Plaintiff’s allegations do not show that she is in *imminent* danger of *serious physical* injury.

III. CONCLUSION AND RECOMMENDATIONS

Based on the foregoing, the Court RECOMMENDS that:

1. Plaintiff’s motion to proceed *in forma pauperis* (Doc. 12) be DENIED; and,
2. This action be DISMISSED without prejudice to refile upon prepayment of the filing fee.

The Court DIRECTS the Clerk of the Court to assign a district judge to this action.

¹ The Court may take judicial notice of court records. *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

² Several of the cases were dismissed without prejudice when Plaintiff failed to file an amended complaint after the court found that she had failed to state a cognizable claim. When a “court dismisses a complaint on the ground that it fails to state a claim, ... the court grants leave to amend, and ... the plaintiff then fails to file an amended complaint, the dismissal counts as a strike.” *Harris v. Mangum*, 863 F.3d 1133, 1143 (9th Cir. 2017). Furthermore, “[a] dismissal ... for failure to state a claim counts as a strike, whether or not with prejudice.” *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1727 (2020).

1 These Findings and Recommendations will be submitted to the United States District
2 Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). **Within 14 days**
3 of the date of service of these Findings and Recommendations, Plaintiff may file written
4 objections with the Court. The document should be captioned, "Objections to Magistrate Judge's
5 Findings and Recommendations." Plaintiff's failure to file objections within the specified time
6 may result in waiver of her rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir.
7 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

8
9 IT IS SO ORDERED.

10 Dated: **June 22, 2020**

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE